IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-429

LUCKY STORES, INC., A CALIFORNIA CORPORATION,
Petitioner,

vs.

VILLAGE OF LOMBARD, AN ILLINOIS MUNICIPAL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF THE PETITIONER IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI.

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Your Petitioner, LUCKY STORES, INC., herein submits this Reply Brief in support of its Petition for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

REASONS FOR GRANTING THE WRIT.

I.

THERE BEING NO CONSTITUTIONAL ISSUE TO BE ADJUDICATED, THE RESPONDENT IMPROPERLY CHARACTERIZES THE PULLMAN DOCTRINE AS CONTROLLING.

The Respondent heavily relies upon and affirmatively tenders to this Court the proposition that the principle enunciated in *Railroad Commission of Texas* v. *Pullman,* 312 U. S. 496 (1941) should apply, with its consequent declination of jurisdiction, in a purely diversity matter. (Brief of Respondent at pp. 2-4). It is submitted by the Petitioner that this type of argument is singularly unpersuasive; for a legal principle, although completely valid in its original context, should not be extended so far that it transforms into merely a rule of expediency rather than one of reason. The *Pullman* doctrine operates as a means of avoiding unnecessary adjudication of *constitutional* issues where a State court construction might obviate the need to pass on the question. However, Petitioner nowhere alleges, nor faintly intimates, that a constitutional infirmity is present. Rather, it merely is seeking to properly invoke the diversity jurisdiction of the federal courts for determining the propriety of its sign pursuant to the Village of Lombard ordinance. Furthermore, the Respondent fails altogether to even confront the central concern presented by the Petitioner herein of whether the doctrine laid down by this Court in *Hicks* v. *Miranda,* 422 U. S. 332 (1975), is operative in a diversity setting, instead, resting upon the impertinent tenets of *Pullman* and its progeny as a means of ousting a diversity suitor from a federal court.

The circumstances of this case do not remotely approach those supporting invocation of *Pullman* abstention, as there is no constitutional question being raised as to the ordinance, but only the application of same to Petitioner's sign. This doctrine no doubt graphically illustrated the judicial effort to reverse the

trend toward federal intervention into state matters which had been authorized by the landmark decision of *Ex Parte Young,* 209 U. S. 123 (1908). Its teachings counsel that in certain federal constitutional challenges to state statutes which is clearly not present in this case, a federal district court should exercise its discretion to stay its action pending interpretation of the challenged statute by the courts of the enacting state and thereby avoid an unnecessary federal constitutional adjudication. Indeed, this formulation was recently reaffirmed by this Court:

> Thus evolved the doctrine of *Pullman* abstention: that a federal action should be stayed pending determination in state court of state law issues central to the constitutional dispute. *Moore* v. *Sims,* ..... U.S. ....., 99 S.Ct. 2371, 2379 (1979).

Accordingly, the doctrine was conceived to enhance notions of comity and further the principles of federalism by leaving to a state the interpretation of unsettled questions of that state's laws when such construction may dispose of a case short of federal constitutional scrutiny, *e.g., Lake Carriers' Ass'n* v. *MacMullan,* 406 U. S. 498, 510-511 (1972); *Lindsey* v. *Normet,* 405 U. S. 56, 60 n. 5 (1972). Indeed, this is coupled with the countervailing proposition not only that there is a clear presumption in favor of retention of federal jurisdiction once conferred, *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 812 (1976); *County of Allegheny* v. *Frank Mashuda Company,* 360 U. S. 185, 188-189 (1959), but it is also well established that the doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain". *Harman* v. *Forssenius,* 380 U. S. 328, 534 (1965).

Here, by stark contrast, it can hardly be imagined that the acceptance of federal diversity jurisdiction in order to resolve the mere applicability, rather than the constitutionality, of the Village of Lombard ordinance to the Petitioner's sign will engender "friction of a premature constitutional adjudication". *Pullman, supra,* 312 U. S. at 500. The issue presented by

Petitioner's complaint is whether or not the Petitioner's sign is a valid non-conforming use under the Village of Lombard sign ordinance provision? It does not ask for a constitutional review of the ordinance, but merely seeks a Federal diversity forum to adjudicate the applicability thereof to its sign. One can only see legal retrogression in extending a salutary principle designed to refrain from deciding unnecessary sensitive federal constitutional questions, to a factual circumstance, such as the pure diversity case at bar, which is wholly inconsistent with its genesis. Where the reason for the rule is wanting, its application should not obtain; as to hold otherwise, might very well enervate diversity jurisdiction, *Propper* v. *Clark*, 337 U. S. 472, 492 (1949), at the hands of the *Pullman* doctrine, with the consequence of finding abstention to be the rule rather than the exception to the exercise of federal jurisdiction.

The unseemly interposition of the *Pullman* doctrine takes on an added dimension in view of the fact that the substantive law to be applied by the federal court sitting in diversity is not ill-defined, as it is so required to be for abstention to prevail. *Harman* v. *Forssenius, supra,* 380 U. S. at 534. Instead, the Illinois Supreme Court has clearly stated that "the rules applicable to non-conforming uses are well settled." *County of DuPage* v. *Elmhurst-Chicago Stone Company,* 18 Ill. 2d 479, 165 N. E. 2d 310, 312 (1960). Moreover, any suggestion that a federal constitutional question may nevertheless lurk in the background of the Petitioner's Complaint for a Declaratory Judgment is not enough to elevate the issue presented into one potentially ripe for *Pullman* to be brought into play. *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25, 33 (1959) (dissenting opinion). The case cited by the Respondent of *City of Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168 (1942) does not compel a different result. (Brief of Respondent at p. 2). There, *Fieldcrest Dairies* prayed for a declaratory judgment concerning the applicability of a city ordinance in its complaint that alternatively sought to render such ordinance unconstitutional if an adverse construction thereto was pronounced by the Court. 316 U. S. at 170. The issue presented was further complicated with the dispute involving a question as to whether the city ordinance had violated a particular state enactment. The indelicacy of construing the ordinance without authoritative guidance from the Illinois Courts, together with the alleged conflict of authority between the city and state acts, counseled abstention to forbear passing on the asserted constitutional infirmity to the ordinance. Above all, not only did this Court in *Fieldcrest Dairies* characterize their abstaining under the *Pullman* doctrine as a means for "[a]voidance of constitutional adjudications where not absolutely necessary", 316 U. S. at 173, but so also have subsequent decisions. *e.g. Harrison* v. *N. A. A. C. P.,* 360 U. S. 167, 176 (1959). There is, however, no correlative intimation in any of the cases that the wisdom of *Pullman* should be equally prescribed in a purely diversity matter, such as that at hand. It cannot be overemphasized that the Petitioner does not seek nor has he ever asserted that the ordinance in question is remotely susceptible to constitutional challenge. Rather, he is simply invoking the diversity jurisdiction of the federal courts as a forum to litigate the suitability of his sign as set against the Village of Lombard ordinance concerning the propriety of non-conforming uses. It would certainly be an innovative principle and establish a dangerous precedent to hold that the *Pullman* doctrine dictates abstention in a purely diversity context and in the complete absence of any constitutional claim; indeed, this Court has admonished that "it was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a state court could entertain it." *Alabama Public Service Commission* v. *Southern Railway Company,* 341 U. S. 341, 361 (1951) (Frankfurter, J., concurring).

In like fashion, the Respondent contends that because the matters of this case implicate concerns peculiarly within the province of a state as delegated to a municipal corporation,

abstention is especially appropriate. (Brief of Respondent at pp. 2-3). However, the ramifications of such a conclusory proposition are directly at variance with and betoken a pernicious oversimplification of the inherent tenets of federalism. Rather, the hallmark of "Our Federalism", *Younger* v. *Harris,* 401 U. S. 37, 44 (1971), contemplates an "accomodation of competing interests", *Hicks* v. *Miranda,* 422 U. S. 332, 357 (1957) (Brennan, J. dissenting), which could easily be distorted beyond recognition by espousal of that proferred by Respondent. Indeed, simply because the Illinois substantive law of non-conforming uses, as set forth in the Village of Lombard ordinance, is brought into play in a federal forum where jurisdiction is based purely on diversity of citizenship, should not talismanically offer a litigant the protective mantle of abstention, nor the federal court the opportunity to forebear from discharging their Congressionally directed responsibility. Moreover, the Respondent's characterization of absention could very well convert that doctrine into a mere semantical joust in interpreting what constitutes matters peculiarly within the bailiwick of a sovereign, rather than endeavoring to properly balance the competing interests in a federal-state dichotomy.

Confronted with the foregoing propositions, it is submitted by the Petitioner that the touchstone for abstention ought not turn exclusively on the subject matter engaged in before the federal court, but upon the potential disruptive effect to be perceived by undertaking such an exercise of jurisdiction. As this Court has plainly observed in a diversity context, the fact that the sovereignty of a state is involved, *County of Allegheny* v. *Frank Mashuda Co., supra,* 360 U. S. at 191-192, or that the matter is "peculiarly within the State's competence to regulate", *Id.* at 192 n. 3, is no legitimate reason for abstention to obtain. Similarly, it taxes one's credulity to contend that the simple application of a village ordinance can have such a substantial public import the resolution of which would result in outweighing a clear Congressional mandate to the contrary. 28 § *U. S. C.* § 1332(a). For it need

hardly be said that the federal court would be applying the same Illinois substantive law that an otherwise Illinois tribunal would find operative. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938). In this connection, the Respondent further maintains that the issue to be resolved herein is a state concern whose adjudication more properly should be determined in the Illinois courts. (Brief of Respondent at pp. 2-3). Yet, the fundamental flaw in this analysis lies in the fact that pursuant to diversity jurisdiction, the issues encountered by a federal court will, by definition, invariably be state-created rights. There is no denying that the strict logic of Respondent's contentions, if carried to its ultimate conclusion, might completely swallow up the fountainhead of diversity jurisdiction, as well as fly in the face of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them". *Colorado River Water Conservation District* v. *United States, supra,* 424 U. S. 800, 817 (1976). Consequently, inasmuch as this Court, in no uncertain terms, has opined that it is inappropriate for a federal court to "dismiss a suit merely because a State court could entertain it", *Alabama Public Service Commission* v. *Southern Railway Company, supra,* 341 U. S. at 361, those same compelling considerations dictate that it was error to likewise abstain in the case at bar.

What is more, Respondent intimates that in view of the growing dissatisfaction with diversity jurisdiction, the principles announced in the *Pullman* doctrine should be applicable to oust the Petitioner from a federal forum. (Brief of Respondent at pp. 3-4). It is unquestionably beyond the province of the judiciary to weigh the wisdom of the conferral of diversity jurisdiction upon the federal courts. This well-settled proposition was broadly stated by Mr. Chief Justice Marshall,[1] and specifically addresed to more recently by Mr. Justice Frankfurter:

1. "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law". *Osborn* v. *Bank of United States,* 22 U. S. (9 Wheat.) 738, 866 (1824).

Thus, the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts. That is the theory of diversity jurisdiction. Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. (citation omitted). But I must decide this case as a judge and not as a legislative reformer.

* * * * *

We are dealing, then, not with a jurisdiction evolved and shaped by the courts, but rather with one explicitly conferred and undeviatingly maintained by Congress. *Burford* v. *Sun Oil,* 319 U. S. 315, 337 (1943) (Frankfurter, J.) (dissenting opinion).

Similarly, as has been underscored by Petitioner in this brief, the procedural standard declared in *Pullman* was fashioned to spare the federal courts of constitutional adjudication when a narrowing construction of the statute in question by the State Courts to obviate the infirmity may be forthcoming. On the other hand, that decision should not mean to suggest unmitigated judicial abdication of resolving purely state-created rights, especially in view of the historic function of federal courts in executing their diversity mandate.

In short, it is precisely due in large measure to the delicacy of and apparent confusion over the parameters of the judicially created abstention doctrine, with its correlative principles of federalism, comity and equity, that clearly warrant Supreme Court review and guidance in this matter.

II.

IT WAS IMPROPER AS A MATTER OF LAW FOR THE DISTRICT COURT TO DENY PETITIONER AN OPPORTUNITY TO AMEND ITS COMPLAINT.

As the Petitioner sets forth in its brief (at p. 16), Rule 15(a) of the Federal Rules of Civil Procedure states that "[a] party may amend his pleading once as a matter of course any time before a responsive pleading is served . . .". In this regard, it is firmly established that a motion to dismiss does not constitute a "responsive pleading" within the meaning of Rule 15(a) and hereby confers upon the movant a right to amend its complaint without first securing leave of court. This proposition is not only inveterate with precedent in the Seventh Circuit, *Labatt* v. *Twomey,* 513 F. 2d 641, 650-651 (7th Cir. 1975); *Fuhrer* v. *Fuhrer,* 292 F. 2d 140, 142 (7th Cir. 1961); *Petterson Steels, Inc.* v. *Seidmon,* 188 F. 2d 193, 194 (7th Cir. 1951); *Oskierko* v. *Southwestern Horizons, Inc.,* 60 F. R. D. 365, 369 (N. D. Ill. 1973), but finds further support in sister circuits, *e.g., McDonald* v. *Hall,* 379 F. 2d 120, 121 (1st Cir. 1978); *Smith* v. *Blackledge,* 451 F. 2d 1201 (4th Cir. 1971), as well as authoritative commentators. *See, e.g.,* Wright, *Law of Federal Courts,* 310 (3rd ed. 1976). The Respondent, having merely filed a motion to dismiss the Petitioner's complaint, and in the absence of answering thereto, as a matter of law afforded the Petitioner an opportunity to amend its complaint.

The element of discretion, albeit appropriate when leave of court is necessary, is conversely not permitted when, as here, there has been no responsive pleading submitted. The positive language of the Rule coupled with the distinct trend, if not the clear weight of authority, as evidenced in the case law, leaves no room for doubt that the District Court erred in not according Petitioner an opportunity for amending its position.

The decision of *Sarfaty* v. *Nowak,* 369 F. 2d 256 (7th Cir. 1966) cited by the Respondent (Brief of Respondent at p. 4),

if not erroneous as a matter of law concerning the propriety of amendment in light of subsequent pronouncements by the same Court, as well as the clear weight of authority, is factually distinguishable. Not only was *Sarfaty, supra,* a case where abstention was invoked in a classic *Pullman* context, rather than one based purely on diversity of citizenship jurisdiction, but moreover, its underlying reasoning denying a right to amend is somewhat fallacious. This conclusion flows from the simple fact that the decision itself antedated that laid down in *Younger* v. *Harris,* 401 U. S. 37, 54 (1971), the latter fashioning an *exception* to the abstention doctrine in the form of bad faith, harrassment or other unusual circumstances, within which the Petitioner herein merely seeks an opportunity to allege and contrariwise was not available at the time of the *Sarfaty* holding.

At a minimum, the abstention doctrine reveals that the applicability of the principle, and its consequent abnegation of jurisdiction, is determined by a careful balancing of vying interests necessarily reflective of federalism concerns, instead of by mechanical reference to precise rules. *Baggett* v. *Bullitt,* 377 U. S. 360, 375 (1964); *Younger* v. *Harris, supra,* 401 U. S. at 44. These same considerations should equally dictate and therefore decidedly weigh in favor of a generous disposition toward amendment when confronted with an abstention interposition. Indeed, permitting such amendment so as to endeavor to utilize, if bona fide, the safe harbor carved out by *Younger* v. *Harris,* 401 U. S. at 34, would engender no discernible violence to the fragile intersecting of federal and state interests, but would merely effectuate both the *Younger* exceptions to abstention and correspondingly reaffirm the tenet that abstention is the exception rather than the rule for a district court to adjudicate a controversy properly before it. *County of Allegheny* v. *Frank Mashuda Company, supra,* 360 U. S. at 188-189. Clearly, if Petitioner were allowed to amend its complaint it urges that it could plead and prove the "bad faith, harassment etc." set forth in the *Younger* exceptions.

III.

THIS WRIT SHOULD BE GRANTED SO THAT THIS COURT CAN REVIEW THE NEED FOR REQUIRING A HEARING PRIOR TO THE INVOCATION OF ABSTENTION IN A PURELY DIVERSITY CONTEXT.

Quite apart from error on part of the District Court in failing to allow Petitioner, as a matter of course to amend its complaint, is the nagging sense of unfairness for a court in one of breath to *sua sponte* raise the abstention doctrine, and then in another, to altogether foreclose a litigant from even attempting to formulate a response thereto. Just as the abstention doctrine was not intended to furnish a federal court with a cloak of immunity from resolving purely state law conflicts, *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 234 (1943), nor should it be invested with untrammeled discretion in determining *when* the circumstances are ripe for calling the doctrine into play. It is submitted by the Petitioner that, at the very least, a hearing, the contours of which would be decided by this Court, must be provided if abstention is invoked by a district court *sua sponte*.

If for no other reason, this Court should grant the Petition for Writ of Certiorari herein to articulate and mandate the requirement and safeguards of conducting an abstention hearing so that the true impact on the federal-state relationship can be assessed based on evidence and not mere supposition and conjecture. In this manner, the propriety of abstaining, as a function of the sensitivity of the issue sought to be resolved, would be fully examined before the court may settle on declining jurisdiction. The interests of federalism would be correspondingly served and the virtual "unflagging obligation of the federal courts to exercise the jurisdiction given them", *Colorado River Water Conservation District, supra,* 424 U. S. at 817, would truly be effected, rather than merely accorded lip service as in the past. The dire need for such an abstention hearing is brought into sharp focus by the case at hand. The Petitioner was not

only denied its right to amend its complaint as a matter of course, but more significantly, it was never accorded the bare opportunity to impugn the District Court ruling as to whether the substantive matter of applying the non-conforming use law of Illinois would truly occasion an impermissibly disruptive effect on federal-state relations.

The bare face of the pleadings was all that was before the District Court. This analysis proceeds on the principle that the abstention doctrine is not an "automatic rule applied whenever a federal court is faced with a doubtful issue of state law", *Baggett* v. *Bullitt*, 377 U. S. 360, 375 (1964), rather, it is a procedural application of which "must be made on a case-by-case basis". *Id.* As the doctrine is invoked only after a factual inquiry of the particular case, a hearing on its interposition would comport with its proper usage. For if the "avoidance of needless friction" standard in the area of federal-state relationships, *Zwickler* v. *Koota*, 389 U. S. 241, 255 (1967) (Harlan, J., concurring), is the litmus test for abstention, and if applied without due consideration, very few cases based purely on diversity jurisdiction would find themselves in federal court. The application of the doctrine, therefore, must of necessity, look to the circumstances in which the declination of jurisdiction is sought to be administered, and, in this regard, a pre-abstention hearing would certainly further enhance that inquiry.

The central concept to the abstention doctrine no doubt is highly malleable so as to adapt to the equally flexible principles intrinsic to federalism. Yet, to fundamentally alter or altogether defeat the avowed purpose underlying the grant of diversity jurisdiction of affording an impartial tribunal to out of state citizens, *Pease* v. *Peck*, 59 U. S. (18 How.) 595, 599 (1856), without even the bare chance to challenge such an "exceptional circumstance" to the duty of federal courts to adjudicate controversies properly before it, *County of Allegheny* v. *Frank Mashuda Company, supra*, 360 U. S. at 188-189, is just as offen-

sive to traditional notions of abstention, comity and federalism, as is federal "centralization of control over every important issue in our National Government and its courts". *Younger* v. *Harris, supra*, 401 U. S. at 44. An element of legal jugglery by means of invoking the abstention doctrine must not devitalize a clear Congressional directive to the contrary; indeed, the "right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied". *Wilcox* v. *Consolidated Gas Company*, 212 U. S. 19, 40 (1909).

CONCLUSION.

It is urged by the Respondent that the *Pullman* doctrine, as applied in a diversity context, effectively is dispositive of the issues herein presented and that accordingly this Court need not pass on the propriety of *Younger* and *Hicks* in such a similar circumstance. On the contrary, however, it is submitted by the Petitioner that precisely on account of the *Pullman* doctrine being unseemly, both as a matter of principle and logic, as a means to abstain from diversity jurisdiction properly invoked, that this Court should reach the questions sought for review. Furthermore, even if this Court should find the reasoning for and attendant to the abstention doctrines, as declared in *Pullman, Younger* and *Hicks* to apply with full force in a pure diversity settting, the complete absence of an opportunity to amend, or more significantly, the total lack of affording the Petitioner a pre-abstention hearing when such doctrine is raised *sua sponte* by the District Court, equally warrants examination by this Court. It is one thing to say that the abstention doctrine is aimed at minimizing friction in a federal-state relationship, but it is quite another to acknowledge a constructive principle into becoming a handmaiden of abdication.

For the reasons stated above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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